90-1208

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1990

IN RE JAMES C. PEARSON AND
IDA J. PEARSON, DEBTORS

JAMES C. PEARSON and IDA J. PEARSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI WITH APPENDIX

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I

QUESTIONS PRESENTED FOR REVIEW

I. Whether Congress, in enacting 11 U.S.C. Section 106(c), abrogated federal sovereign immunity to suit by a debtor in bankruptcy.

II. Whether 11 U.S.C. section 106(c), read in conjunction with 11 U.S.C. Section 362, authorizes a debtor in bankruptcy to recover a money judgment against the United States of America for violation of an automatic stay.

II

PARTIES BELOW

Parties before the United States Court of Appeals for the Ninth Circuit in Pearson v. United States of America were James C. Pearson and Ida J. Pearson as Plaintiffs-Appellants, and the United States of America as Defendant-Appellee.

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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JAMES C. PEARSON
and
IDA J. PEARSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent

_____

On Petition for Writ of Certiorari
to
the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported, and appears in the appendix hereto.

The opinion of the United States District Court for the District of Oregon in In re Pearson is unreported, and appears in the appendix hereto.

The opinions of the United States Bankruptcy Court of the District of Oregon in In re Pearson are unreported, and appear in the appendix hereto.

JURISDICTIONAL STATEMENT

Petitioners, James C. Pearson and Ida J. Pearson, respectfully pray that a writ

of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 30, 1990. This Court has jurisdiction to review said judgment and opinion by writ of certiorari under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

The full text of the following statutory provisions is set forth in the appendix hereto:

11 U.S.C. Section 106(c)

11 U.S.C. Section 362

STATEMENT OF THE CASE

In re James C. Pearson and Ida J. Pearson, Debtor No. 687-07337, is a Chapter 13 Bankruptcy case filed in the United States Court for the District of Oregon (hereinafter "Bankruptcy Court"). The Petitioners herein, James C. Pearson and

Ida J. Pearson, are the debtors in said Chapter 13 case.

Petitioners filed their petition for relief under 11 U.S.C., Chapter 13, on March 15, 1985. The Internal Revenue Service first received notice of that petition on or about April 9, 1985. The Internal Revenue Service filed no claim against Petitioners in the case appealed herein. Despite receiving notice of the bankruptcy proceeding, on July 19, 1985, the Internal Revenue Service sent Petitioners a request for payment of their pre-petition, 1981 tax liability. On July 30, 1985, Petitioners' attorney responded by mailing the Internal Revenue Service a second notice of the bankruptcy proceeding. Disregarding that second notice, on August 23, 1985, the Internal Revenue Service sent Petitioners a second demand for payment of the 1981, pre-petition taxes. On March 14,

1986, the Internal Revenue Service sent Petitioners a third notice with notice of intent to levy to secure payment of Petitioners' unpaid, 1981 taxes. Petitioners' attorney responded by sending the Internal Revenue Service a third notice of the bankruptcy proceeding.

On April 15, 1986, the Internal Revenue Service offset Petitioners' 1985 tax refund of $825 against Petitioners' unpaid income tax liability from 1981. On June 4, 1986, Petitioners filed a complaint, adversary proceeding number 686-6076, against the Federal Government to hold the Internal Revenue Service in contempt for violating the automatic stay provision of 11 U.S.C. 362(a) of the Bankruptcy Code, (hereinafter "Code") and to recover general and punitive damages and attorney's fees pursuant to 11 U.S.C.

362(h) of the Code, and the court's civil contempt powers.

On February 16, 1987, the Internal Revenue Service sent yet another past due notice to Petitioners, again requesting payment of Petitioners' 1981 taxes, together with notice of the Internal Revenue Service's intent to levy on and file tax liens against Petitioners' property. On March 20, 1987, the Internal Revenue Service offset Petitioners' 1986 tax refund of $620 against Petitioners' unpaid 1981 tax liability. On April 11, 1987, Petitioners filed a second complaint against the Federal Government, adversary proceeding number 687-5110 alleging additional willful violations of the automatic stay.

The parties stipulated that the Internal Revenue Service had received timely notice of the automatic stay, and

stipulated to facts which revealed that there were numerous violations of the automatic stay by agents of the Internal Revenue Service over an extended period of time. On March 4, 1988, the Bankruptcy Court entered Findings of Fact and Conclusions of Law regarding adversary number 686-6076, and issued a Judgment in favor of Petitioners. The Bankruptcy Court found that the United States had waived sovereign immunity for purposes of 11 U.S.C. 362(h) by operation of 11 U.S.C. 106(c). The Bankruptcy Court ruled accordingly that the Internal Revenue Service had committed five willful violations of the automatic stay, and entered judgment for Petitioners for damages in the amount of $1000 and attorney's fees in the amount of $2790.

On November 14, 1988 the Bankruptcy Court entered Findings of Fact and

Conclusions of Law regarding adversary number 687-5110, finding additional willful violations of the automatic stay by the Internal Revenue Service. On December 20, 1988, the Bankruptcy Court entered Judgment in favor of Petitioners in adversary proceeding number 687-5110, in the amount of $1,980.00.

The United States filed timely notices of Appeal to the United States District Court for the District of Oregon on both adversary proceedings. On February 21, 1989 the United States District Court granted the Motion by the United States to consolidate both adversary proceedings for the purposes of appeal. On October 3, 1989 the District Court entered an Opinion and Order vacating the Judgments by the Bankruptcy Court and entering Judgment for the United States, on the grounds that the Federal Government had not waived its

sovereign immunity to suit from monetary judgments pursuant to 11 U.S.C. 106(c), and so the Bankruptcy Court lacked jurisdiction to make a damage award.

On November 1, 1989, Petitioners timely appealed the decision of the District Court to the United States Court of Appeals for the Ninth Circuit (hereinafter "Ninth Circuit"). On October 30, 1990, the Ninth Circuit affirmed the decision of the District Court. From that decision flows this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

This Court should grant Petitioners' petition for writ of certiorari in this case for the following reasons. First, the decision of the Ninth Circuit in In re Pearson, No. 89-35819 slip op. (9th Cir. Oct. 30, 1990) is in direct conflict with the decision, on the same and directly

analogous matters, of the United States Court of Appeals for the Sixth Circuit (hereinafter "Sixth Circuit") in In re Nordic Village, Inc. No. 89-3656, slip op. (6th Cir. Oct 4, 1990). The Sixth Circuit's decision in Nordic Village conflicts in turn with the earlier decision of the United States Court of Appeals for the Eight Circuit in Small Business Association v. Rinehart, 887 F.2d 165 (8th Cir. 1989), affirmed in United States v. McPeck, No. 89-5902, slip op. (8th Cir. October 30, 1990).

Second, the underlying issue presented for review in this case is whether Congress has waived the federal government's sovereign immunity from suit from monetary judgments under Section 106(c) of the Code. These three United States Courts of Appeals have reached conflicting opinions on this question precisely because the Supreme

Court has provided no controlling analysis of the statute. The issue in this case is an important question of federal law which has not been, but should be, settled by this Court.

In Pearson, the Ninth Circuit addressed two issues. The first was whether 11 U.S.C. 106(c) waives federal sovereign immunity from suit for money damages. The second issue was whether 11 U.S.C. 362(h), permitting damage awards for violation of the automatic stay, read in conjunction with 11 U.S.C. 106(c), applies to federal governmental units.

With respect to the first issue, the Ninth Circuit decided that the language of 11 U.S.C. 106(c) did not authorize suits against the federal government to recover money damages. In attempting to discern and apply the reasoning of the plurality in Hoffman v. Connecticut Dept. of Income

Maintenance, 109 S. Ct. 2818 (1989), the Ninth Circuit ruled that 11 U.S.C. 106(c) waived federal sovereign immunity for purposes of injunctive and declaratory relief only, and did not waive federal immunity from suit for money damages. In re Pearson, No. 89-35819, slip op. at 13429. This holding by the Ninth Circuit is consistent with the decision of the Eight Circuit in Rinehart. However, both of those decisions conflict directly with the Sixth Circuit's decision on the same matter in Nordic Village, which found a clear waiver of federal sovereign immunity for monetary judgments pursuant to the same statutory provision.

With respect to the second issue, the Ninth Circuit held that, because 11 U.S.C. Section 362(h), which permits damage awards for violations of an automatic stay, does not include any of the three "magic" words

required in order to trigger applicability of 11 U.S.C. 106(c), subsection 362(h) is not applicable to federal governmental units. In re Pearson No. 89-35819, slip op. at 13430. Here again, however, the Ninth Circuit failed to address the different standard applicable where a Congressional waiver of federal sovereign immunity is alleged. As a result, the Ninth Circuit's holding on this issue conflicts with the holding of the Sixth Circuit in Nordic Village regarding a directly analogous provision of the Code.

In Nordic Village, the trustee in bankruptcy sought to recover a voidable transfer made to the Internal Revenue Service by an officer-shareholder of Nordic some months following the filing of Nordic's Chapter 11 petition. The trustee initiated a proceeding to recover the post-petition transfer. The District

Court and United States Court of Appeals for the Sixth Circuit affirmed the Bankruptcy Court's determination that the transfer was voidable under Section 550 of the Code.

In upholding the lower court decisions, the Sixth Circuit first addressed the jurisdictional question, raised again by the case at bar, of whether federal sovereign immunity was waived by Section 106(c) of the Code. The Sixth Circuit rejected the argument that Hoffman, which addressed the issue of Congressional waiver of the states' Eleventh Amendment, was controlling where a question of waiver of federal sovereign immunity is involved. Rather, the Sixth Circuit noted that "In this case, the issues do not involve the Eleventh Amendment, but simply raise the intent of Congress to waive sovereign immunity regarding claims against the

Internal Revenue Service. These two cases are very different and involve very different burdens and analyses.... This is a simple case involving construction of language enacted by Congress, not a Constitutional amendment relating to a fundamental concept of federalism." In re Nordic Village, Inc., No. 89-3656, slip op. at 11.

Having determined the inapplicability of Hoffman, which addressed "issues relating to states' rights and central power and the various doctrines that have developed to prevent overreaching by the federal government," the Sixth Circuit next determined that a close reading of Hoffman, wherein four Justices found no waiver of the states' sovereign immunity and a fifth Justice concurred on other grounds, provided no analytic framework for

determining whether 11 U.S.C. 106(c) effected a waiver of federal sovereign immunity. Because Hoffman provided no pertinent analysis on this separate and legally distinct issue, the Sixth Circuit independently addressed the issue, a simple determination of the meaning of the statute. The Sixth Circuit's analysis focused upon the different standards involved in determining whether Congress has waived the states' Eleventh Amendment immunity, as opposed to federal sovereign immunity. Following a careful parsing of the statute and review of the legislative history, the Sixth Circuit concluded--contrary to the holding reached by the Ninth Circuit in Pearson--that "the statute, in clear and explicit terms, prevents the IRS from asserting the defense of sovereign immunity. This is supported by the legislative history, as noted by the

Marshall opinion in Hoffman." In re Nordic Village, Inc., No. 89-3656, slip op. at 12.

The Sixth Circuit's determination that the wording of the statute effected a clear waiver of federal sovereign immunity is supported by a careful reading of the pertinent provision. 11 U.S.C. 106(c) provides that "governmental units" are to be bound by provisions of the title which contain any of three "trigger" words--notwithstanding any assertion of sovereign immunity. 11 U.S.C. 106(c). The statute does not provide merely for a partial waiver of sovereign immunity in cases where injunctive or declaratory relief is sought. Rather, the wording of the statute makes clear that no assertion of sovereign immunity is intended to withstand judicial determination of an issue arising under a provision of the Code which contains one of the three trigger words.

In contrast to the Sixth Circuit's painstakingly researched and carefully reasoned determination that 11 U.S.C. 106(c) waives federal sovereign immunity from monetary judgments, the Ninth Circuit reached a conflicting, conclusory holding regarding the same statutory provision, evidently based only upon a cursory readin of the Hoffman decision. Thus, the Ninth Circuit asserted baldly that the reasoning of the Hoffman plurality "is equally applicable to the immunity of the United States."

In Hoffman, without addressing the standards which must be met in order to effect a waiver of federal sovereign immunity, four Justices found the intentions of Congress in enacting 11 U.S.C. 106(c) insufficiently clear to meet the very high standards required for a waiver of the states' Eleventh Amendment.

Hoffman, 109 S. Ct. at 2822. The four dissenting Justices found that the intent of Congress in enacting 11 U.S.C. 106(c) was so abundantly clear as to effect a waiver of the states' Eleventh Amendment immunity to suit from monetary judgments. Hoffman, 109 S. Ct. at 24-25. Justice Scalia concurred in the decision that 11 U.S.C. 106(c) effected no waiver, but on the grounds that Congress has no power to abrogate the states' Eleventh Amendment immunity. Hoffman, 109 S.Ct. at 24. As the Sixth Circuit tersely noted, Hoffman is not precedent for this case. In re Nordic Village, Inc., No. 89-3656, slip op. at 9. The Ninth Circuit failed to address the significance of the divisions within the Hoffman Court, including the possibility that any or all members of the Hoffman plurality might reach a different determination on the legally distinct issue

of an alleged waiver of federal sovereign immunity. The Ninth Circuit also failed to itself discuss the alternate legal analysis applicable where a waiver of federal sovereign immunity is asserted.

Having concluded that 11 U.S.C. 106(c) fails to waive federal sovereign immunity to suit for money judgments, the Ninth Circuit proceeded to invoke a footnote in the Hoffman dissent by way of determining that 11 U.S.C. 106(c) is inapplicable to subsection 362(h) of the Code, which authorizes damages for violation of an automatic stay. In re Pearson, No. 89-35819, slip op. at 13430. While the Ninth Circuit's analysis, if any, is difficult to discern from the text of its decision, it appears that the Ninth Circuit reasoned that each and every subsection of the Code must contain one of the 11 U.S.C. 106(c) trigger words in order for a 11 U.S.C.

106(c) waiver of sovereign immunity to apply to that subsection.

The Ninth Circuit erred in slavishly applying the dicta contained in the Hoffman dissent to the case at bar. The footnote contained in the Hoffman dissent addresses merely the issue of Congressional waiver of the states' Eleventh Amendment immunity to suit from money judgment.[1] The Hoffman dissenters suggest that 11 U.S.C. 362(h) fails to meet the stringent requirement that Congress' intent to abrogate the states' Eleventh Amendment immunity be "unmistakably clear." Hoffman, 109 S.Ct.

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[1] Several Code provisions that permit money judgments do not apply to States. For example, Section 362(h) (1982 ed, Supp V) provides that an individual injured as the result of a willful violation of an automatic stay may recover actual damages and, where appropriate, punitive damages. Because Section 362(h) contains no trigger words, it does not apply to States. Hoffman 109 S. Ct. at 2826, n. 4 (1989),

at 2826. But as discussed above, a different analysis is involved when, as here, an issue of waiver of federal sovereign immunity is alleged. As a result, the footnote in the Hoffman dissent is simply irrelevant to the issue of whether 11 U.S.C. 362(h), read in conjunction with 11 U.S.C. 106(c), effects a waiver of federal sovereign immunity to suit for money damages.

Further, the Ninth Circuit's reasoning regarding the applicability of 11 U.S.C. 106(c) to subsection 362(h) is inconsistent with the approach taken by the Sixth Circuit in applying 11 U.S.C. 106(c) to an analogous provision of the Code, and results in inconsistent interpretations of directly comparable provisions of the Code. In Nordic Village, the Sixth Circuit first determined that 11 U.S.C. 106(c) operates to abolish the defense of sovereign

immunity in cases involving a provision of the Code that contains any of the trigger words "creditor," "entity," or "governmental unit," as discussed above. The Sixth Circuit then proceeded to address the applicability of the 11 U.S.C. 106(c) waiver provision to Section 550 of the Code.

The Sixth Circuit correctly recognized that Section 550(a) of the Code, which authorizes suit by a trustee to recover certain unauthorized transfers, contains such a key word, triggering the 11 U.S.C. 106(c) waiver.[2] In re Nordic Village Inc.,

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[2]Section 550. LIABILITY OF TRANSFEREE OF AVOIDED TRANSFER

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b) or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

No. 89-3656, slip op. at 4-5. Accordingly, the Sixth Circuit found that Section 550, read in conjunction with 11 U.S.C. 106(c), operated to waive federal sovereign immunity and to authorize the trustee to recover from the Internal Revenue Service the unauthorized transfer. Id. at 6.

In determining the Internal Revenue Service's liability pursuant to Section 550, the Sixth Circuit then methodically discussed the Internal Revenue Service's

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(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from--

(1) a transferee that takes for value including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

actions under subsection 550(b), which prevents a trustee from recovering an otherwise avoidable transfer if the transferee takes for value, in good faith, and without knowledge of the voidability of the transfer. Id. at 12-15. Significantly, the Sixth Circuit interpreted the statutory section as a whole, in effect finding that the one-time use of the word "entity" in subsection 550(a) was sufficient to trigger the 11 U.S.C. 106(c) waiver as to subsection 550(b), which contained none of the trigger words. In so doing, the Sixth Circuit followed the admonition set forth by this Court in Richards v. United States, 369 U.S. 1 (1961), that "We believe it fundamental that a section of a statute should not be read in isolation from the whole Act" and that in interpreting legislation one "must not be guided by a

single sentence or member of a sentence but [should] look to the provisions of the whole law, and to its object and policy." Id. at 11.

Here, by its terms, 11 U.S.C. 362(h) refers back to 11 U.S.C. 362(a), which sets forth the terms for creation and defines the effects of an automatic stay. Section 362(h) reads: "An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages." 11 U.S.C. 362(h) does not stand on its own, but can only be understood by reference to 11 U.S.C 362(a). As a result, Petitioners contend that 11 U.S.C. 362(h) logically incorporates the terms of 11 U.S.C. 362(a), including the trigger word "entity" contained therein. Only such a reading of the statutory

sections as a whole conforms to this Court's established rules of statutory interpretation.

In sum, Petitioners contend that by invoking a footnote in the Hoffman dissent as its sole basis for concluding that subsection 362(h) does not apply to federal governmental units, the Ninth Circuit has effectively rejected this Court's established rules of statutory interpretation requiring that sections of statutes be read as a whole, taking the statute's "object and policy" into account.

For purposes of application of this Court's rules of statutory interpretation, the statutory provisions of the Code addressed by the Sixth Circuit in Nordic Village are very similar to the provisions of the Code addressed by the Ninth Circuit in Pearson. However, the Ninth Circuit's failure to give credence to the standard

rules of statutory interpretation has resulted in a decision that conflicts in principle and by analogy with the Sixth Circuit's decision in Nordic Village.

CONCLUSION

For the foregoing reasons, Petitioners pray that this Court grant certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JAMES C. PEARSON;
In re: IDA J. PEARSON, Debtors.

JAMES C. PEARSON;
IDA J. PEARSON, Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, Defendant-Appellant.

No. 89-35819
D.C. No. CV-89-686-FR
OPINION

Appeal from the United States
District Court for the
District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and Submitted
September 13, 1990--Portland, Oregon

Filed October 30, 1990

Before: William C. Canby, Jr., Alex Kozinski and Stephen S. Trott, Circuit Judges.

Opinion by Judge Kozinski; Concurrence by Judge Trott

KOZINSKI, Circuit Judge:

This case presents an issue of first impression in this circuit: Is the United States immune from suit for money damages for violating the Bankruptcy Code's automatic stay, 11 U.S.C. Section 362(a)?

A. Bankruptcy Code section 106(c) provides that "governmental units" are bound by any code provision that "contains 'creditor,' 'entity,' or 'governmental unit'...[and by] a determination of the court of an issue arising under such a provision...." 11 U.S.C. Section 106(c) (emphasis added). The Code's automatic stay provision, in turn, operates against all "entities," 11 U.S.C. Section 362(a); it therefore binds all governmental units pursuant to section 106(c). Because the United States is a governmental unit, 11 U.S.C. Section 101(26), it is bound by the stay. So far everyone agrees.

B. The plurality opinion in Hoffman v. Connecticut Dept. of Income Maintenance, 109 S.Ct. 2818 (1989) (White, J., joined by Rehnquist, C.J., and O'Connor and Kennedy, JJ.) held that section 106(c) only waives sovereign immunity for purposes of injunctive and declaratory relief; it does not waive immunity from suit for money damages. Id. at 2822-23. While Hoffman dealt with the eleventh amendment immunity of the states, the plurality's reasoning is equally applicable to the immunity of the United States. Small Business Administration v. Rinehart, 887 F.2d 165, 169-70 (8th Cir. 1989).

While other courts have found this rationale sufficient, see, e.g., id. at 169-70, we know that four is less than

five. We therefore turn to the reasoning of the four Hoffman dissenters.[1] They concluded that section 106(c) did purport to waive the government's immunity from suit for money judgments. However, they also noted that the Bankruptcy Code provision permitting damages awards for violation of the automatic stay, section 362(h), does not include any of the three magic words of section 106(c), and therefore does not apply to governmental units. Hoffman, 109 S. Ct. at 2826 n. 4 (Marshall, J., joined by Brennan, Blackmun and Stevens, JJ., dissenting). Although a footnote in a dissent is not exactly a holding, we have no reason to doubt that

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[1]Justice Scalia joined neither the plurality nor the dissent. His rationale, that Congress does not have the power to abrogate the states' eleventh amendment immunity, Hoffman, 109 S. Ct. at 2824 (Scalia, J., concurring in the judgment), has no application here.

one or more of the Hoffman dissenters would adhere to this rationale. It therefore appears that a majority of the Supreme Court would hold that governmental units are immune to damages actions arising from violations of the automatic stay. Reading the tea leaves, we so hold.

AFFIRMED.

TROTT, Circuit Judge, concurring:

I concur in the result reached by majority opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re: JAMES C. PEARSON;
In re: IDA J. PEARSON, Debtors.

JAMES C. PEARSON;
IDA J. PEARSON, Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, Defendant-Appellant.

Case No. 685-07337-W13
Civil No. 89-686-FR
Adversary Proceeding
Nos. 686-6076-W and 687-5110

ORDER

IT IS HEREBY ORDERED that the judgment of the United States Bankruptcy Court filed March 4, 1989 is VACATED. Judgment is entered for the United States of America.

DATED this 3 day of October, 1989.

/s/ Helen J. Frye
Helen J. Frye
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re: JAMES C. PEARSON;
In re: IDA J. PEARSON, Debtors.

JAMES C. PEARSON;
IDA J. PEARSON, Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, Defendant-Appellant.

Case No. 685-07337-W13
Civil No. 89-686-FR
Adversary Proceeding
Nos. 686-6076-W and 687-5110

OPINION

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FRYE, Judge:

The matter before the court is the appeal of the defendant, United States of

America (the government), from the judgment entered by the United States Bankruptcy Court in this case on March 4, 1988 ordering the government to pay plaintiffs, James C. Pearson and Ida J. Pearson, the amount of $1,000.00 plus reasonable attorney fees in the amount of $2,790.00 plus costS of $12.00 This court reviews the bankruptcy court's conclusions of law de novo. In re American Mariner Indus., Inc., 734 F.2d 426,429 (9th Cir. 1984).

FACTS

The agreed facts are set forth in the government's statement of the case. The only issues involve the proper application of the law. The Pearsons filed this action against the government seeking to recover money damages for the alleged willful violations of the automatic stay section of 11 U.S.C. Section 362(a). The bankruptcy court found that an award of damages was

authorized under 11 U.S.C. Section 362(h), which states that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."

In reaching this decision, the bankruptcy court found that the government waived its sovereign immunity for the purposes of 11 U.S.C. Section 362(h) through the application of 11 U.S.C. Section 106(c). The bankruptcy court found that the violations of the automatic stay, which were admitted by the government, were willful violations as the government had knowledge of the stay and acted in violation if its provisions.

ANALYSIS

The government argues that the bankruptcy court lacked jurisdiction to

make a damage award against it pursuant to section 362(h)because the government has not waived its sovereign immunity. The government also contends that even if the bankruptcy court had jurisdiction, the bankruptcy court incorrectly interpreted the term "willful" as is used in section 362(h).

The bankruptcy court found that a waiver of immunity from suit of the government for the purposes of the enforcement of section 362(h) against the government is found in the following provisions of 11 U.S.C. Section 106(c):

> (c) Except as provided in subsections (a) and (b) of this section and not withstanding any assertion of sovereign immunity--
>
> (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

In Hoffman v. Conn. Dep't. of Income Maintenance, ___ U.S. ___, 109 S.Ct. 2818 (1989), the United States Supreme Court held that 11 U.S.C. Section 106 (c) does not authorize monetary recovery from the states under the turnover provision, section 542(b), and the preference provision, section 547(b), of the Bankruptcy Code. The court stated: "As we have repeatedly stated, the abrogate the States' Eleventh Amendment immunity from suit in federal court, which the parties do not dispute would other wise bar these actions, Congress must make its intention 'unmistakably clear in the language of the statute.'" 109 S. Ct. at 2822.

The parties in the present action do not dispute that scvereign immunity would otherwise bar this action. While this action involves the application of section 362(h), the Supreme Court's decision in

Hoffman that "[w]e...construe section 106(c) as not authorizing monetary recovery from the states," 109 S. Ct. at 2823, is applicable to preclude the judgment in this case. In light o f the conclusion that the court lacks jurisdiction, the court does not reach the issue of whether the government's conduct was "willful" under section 362(h).

Neither section 106(c) nor any other provision of the Bankruptcy Code, unmistakably expresses the intent of Congress to waive governmental immunity for damages under section 362(h). The court therefore lacks jurisdiction to award

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damages and attorney fees against the government. The judgment of the bankruptcy court filed March 4, 1988 is vacated. Judgment is entered for the government.

DATED this 3 day of October, 1989.

/s/ Helen J. Frye
HELEN J. FRYE
United States District Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE:

James C. Pearson &
Ida J. Pearson, Debtors/Plaintiffs,

vs.

United States of America, Defendant.

Case No. 685-07337
Adversary No. 686-6076-W

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before the Court for trial on August 4, 1987, the parties having appeared through their attorneys of record and based on the testimony of witnesses, review of exhibits and arguments of counsel, this Court makes the following findings of fact and conclusions of law:

1. This Court has jurisdiction over this adversary proceeding. The United States is found to have waived sovereign immunity for the purposes of 11USC Section

362 through the application of 11USC Section 106(c).

2. The defendant committed five violations of the provisions of the automatic stay contained in 11USC Section 362(a): the assessment in April of 1985, the two requests for payment in July and August of 1985, the notice of intention to levy in March of 1986, and the offset of a tax refund in April of 1986, in the amount of $825.00. The Court takes notice that counsel for the defendant has stipulated that defendant will refund said tax refund to the plaintiffs immediately.

3. Said violations were a willful violation as the defendant had knowledge of the stay and acted in violation of its provisions.

4. Plaintiffs are entitled to judgment against defendant for their actual

damages, including costs and attorney's fees pursuant to 11USC Section 362(h).

5. Plaintiffs are also entitled to judgment for actual damages in the form of emotional distress in the amount of $1000.00 as there were five violations of the automatic stay which occurred over a period of approximately one year. Said violations caused the plaintiffs considerable tension, stress, frustration and fear.

6. Plaintiff has failed to prove sufficient grounds for an award of punitive damages and so none will be awarded.

/s/Polly S. Wilhardt
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE

JAMES C. PEARSON and
IDA J. PEARSON, Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendant.

Adversary No. 686-6076-W

MEMORANDUM OPINION

On December 8, 1987, this court held a hearing on the defendant's objection to the plaintiffs' attorney's fees, an itemization of which the plaintiffs' attorney had earlier filed. The itemization of fees had been filed as a result of the court finding, at a trial on August 4, 1987, that the defendant had willfully violated the automatic stay and, pursuant to Section 362 (h), the plaintiffs could recover their fees from the defendant. At the hearing on December 8, 1987, the plaintiffs' attorney

did not appear. At that time the court found that the provisions of 26 U.S.C. Section 7430 applied to the proceeding and allowed the plaintiffs' attorney some additional time to file with the court his argument why his clients should be found to be the "prevailing party" within the meaning of 26 U.S.C. Section 7430(c)(2) and thus be entitled to litigation costs from the United States. The court has reconsidered its earlier decision regarding the applicability of 26 U.S.C. Section 7430 to this proceeding and has determined that it does not apply. It does not apply simply because this proceeding was not brought against the United States to determine the collection of a tax, the refund of a tax or the determination of the amount of a tax. It was brought under the Bankruptcy Code for a court determination that the bankruptcy automatic stay had been

violated and that sanctions were appropriate. Although one of the allegations of violation involved the post-petition application of a refund to tax due and thus in a sense could be described as being "in connection with the. . . refund of any tax. . ." this court believes that the language of 26 U.S.C. Section 7430(a)(1) refers to a proceeding wherein the central theme is the determination of a tax issue, not the determination of a non tax issue which tangentially involves facts about the parties' tax history.

It would appear, however, that the provisions of 28 U.S.C. Section 2412 do apply to this proceeding. This is a civil action brought against the United States and this court has jurisdiction of the action. A federal statute, 11 U.S.C. Section 362(h), specifically provides for an award of attorneys' fees. 28 U.S.C.

Section 2412 supplements the provisions of 11 U.S.C. Section 362(h). Pursuant to 28 U.S.C. Section 2412(d)(1)(B) the party seeking the fees must show it is the prevailing party and allege why the position of the United States was not, on the record, substantially justified. In allowing an award the court must also find that there are no special circumstances which make such an award unjust.

Such fees are, in any event, limited to $75 per hour unless the court finds that a special factor justifies a higher fee. This court knows of no such special factor.

Unlike 26 U.S.C. Section 7430(c)(2)(A), 28 U.S.C. Section 2412 does not contain a specific statutory definition of "prevailing party." Thus this court assumes that "prevailing party" as used in 28 U.S.C. Section 2412 means that party to a proceeding who is largely successful in

arguing their position before the deciding body.

In this proceeding the gravamen of the plaintiffs' complaint was numerous violations of the automatic stay by the defendant. These were stipulated. The court found they should be awarded actual damages, costs and fees pursuant to Section 362(h). The plaintiffs were the prevailing party.

In reviewing the record the court finds the defendants position, up to trial, was

1. This court lacked jurisdiction to award any damages against the United States within the context of these particular facts;

2. The government did not willfully violate the automatic stay;

3. The government did not take any

act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate.

The parties stipulated the Internal Revenue Service had received timely notice of the automatic stay. The parties also stipulated to facts which revealed there were numerous violations of the automatic stay by agents of the Internal Revenue Service over an extended period of time. The stipulated facts demonstrated these violations did not occur as a result of anything the plaintiffs did; rather they resulted from faulty inner-agency processes. The defendant had no evidence to rebut the plaintiffs' allegations of actual damage due to violations of the stay.

Section 362(h) does not define

"willful." Prior to the trial in this case this court was on record, in other proceedings before it not involving the Internal Revenue Service, as holding that it could find "willfulness" within the meaning of Section 362(h) if it were shown the defendant knew of the automatic stay and took steps which were in fact violations; that no specific finding of intent need be made.

Considering the admitted series of unjustified mistakes by the Internal Revenue Service, the admitted knowledge of the bankruptcy, and this court's previous position concerning the interpretation of Section 362(h) this court does not believe on the merits the defendant's position was substantially justified within the meaning of 28 U.S.C. Section 2412(d)(1)(A). The court interprets "substantial

justification" as requiring the government to be able to prove a number of facts, and to make more than simply a good-faith argument, in support of its legal position. The court knows of no circumstances which make an award of fees in this case unjust.

As the defendant does not argue that the hours of attorney time claimed are unreasonable this court shall enter an order awarding 37.2 hours at $75 per hour or $2,790 plus costs of $12.

This memorandum opinion contains the court's findings of fact and conclusions of law. Pursuant to Bankruptcy Rule 9014, which incorporates Rule 7052, they will not be separately stated.

/s/ Polly S. Wilhardt
POLLY S. WILHARDT
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE

James C. Pearson &
Ida J. Pearson, Debtors/Plaintiffs,

vs.

United States of America, Defendant.

Case No. 685-07337
Adversary No. 686-6076

JUDGMENT

Based upon the Court's Findings of Fact and Conclusions of Law, and the Memorandum Opinion entered herein;

IT IS HEREBY ORDERED AND ADJUDGED, that the plaintiffs have judgment against defendant in the amount of $1,000.00 plus reasonable attorney fees in the amount of $2,790.00, plus costs of $12.00.

/s/ Polly S. Wilhardt
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE

PEARSON, JAMES C. &
PEARSON, IDA J., Debtors/Plaintiffs,

vs.

United States of America, Defendant.

Case No. 685-07337
Adversary Proceeding No. 687-5110

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before the Court for trial on August 23, 1988, the parties having appeared through their attorney of record and based upon the testimony of witnesses, review of exhibits and arguments of counsel the Court makes the following findings of fact and conclusions of law:

1. This Court has jurisdiction over this adversary proceeding as the United States has found to have waived sovereign

immunity for the purposes of 11USC Section 362 through the application of 11USC Section 106(c).

2. The defendant committed violations of the provisions of the automatic stay contained in 11USC Section 362(a): On February 16, 1987 a past due notice was sent by the Internal Revenue Service to plaintiffs requesting payment of their 1981 federal income tax deficiency and giving them notice of its intention to levy; and, on March 20, 1987 the Internal Revenue Service offset the 1986 income tax refund of plaintiffs against their unpaid 1981 tax liability in the amount of $620.00.

3. Said violations were a willful violation as the defendant had knowledge of the stay and acted in violation of its provisions.

4. Plaintiff's are entitled to judgment against defendant for their actual damages, including costs and attorney's fees pursuant to 11USC Section 362(a).

5. Plaintiff's are entitled to return of their $620.00 income tax refund; however, the Court is aware that the parties have stipulated that said tax refund was returned to plaintiff's prior to trial. Plaintiff's are not entitled to any damages for emotional distress.

6. Plaintiff has failed to prove sufficient grounds for an award of punitive damages and so none will be awarded.

7. The prior dismissal of the Chapter 13 main case did not deprive the Court of jurisdiction with regard to this adversary proceeding.

/s/ Polly S. Higdon
Polly S. Higdon
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE

PEARSON, JAMES C. &
PEARSON, IDA J., Debtors/Plaintiffs,

vs.

United States of America, Defendant.

Case No. 685-07337
Adversary Proceeding No. 687-5110

JUDGMENT

Based upon the Court's Findings of Fact and Conclusions of the Law;

IT IS HEREBY ORDERED AND ADJUDGED, that the plaintiffs shall have judgment against the defendant in the amount of $1,950.00 as reasonable attorney fees in this matter.

/s/ Polly S. Higdon
Polly S. Higdon
Bankruptcy Judge

11 UNITED STATES CODE Section 106
Section 106. Waiver of sovereign immunity

(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsections (a) and (b) of this section and not withstanding any assertion of sovereign immunity--

(1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

11 UNITED STATES CODE Section 362(a) & (h)
Section 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

. . .

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

Supreme Court, U.S.
FILED
APR 23 1991
OFFICE OF THE CLERK

(2)

No. 90-1208

In the Supreme Court of the United States

OCTOBER TERM, 1990

JAMES C. PEARSON AND IDA J. PEARSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether Section 106(c) of the Bankruptcy Code (11 U.S.C.), waives the sovereign immunity of the United States from claims for money damages based on violations of the automatic stay provision of the Code, 11 U.S.C. 362.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

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JAMES C. PEARSON AND IDA J. PEARSON,
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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 917 F.2d 1215. The opinion of the district court (Pet. App. A7-A13), and the opinions of the bankruptcy court (Pet. App. A14-A29), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1990. The petition for a writ of certiorari was filed on January 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 15, 1985, petitioners filed a petition for relief under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Oregon. In the schedules that accompanied the petition, petitioners listed an obligation owing to the Internal Revenue Service for the tax year 1981. C.A. E.R. 34.

The IRS Special Procedures Branch in Portland, Oregon, received notice of petitioners' bankruptcy petition on April 9, 1985, but did not receive a copy of the schedules listing the IRS as a creditor until sometime later. The Special Procedures Branch asked the IRS Service Center in Ogden, Utah, to determine whether petitioners had any outstanding tax liabilities. The Ogden Service Center checked its records and reported that it found no outstanding liabilities. The Portland Special Procedures Branch accordingly did not file a proof of claim in the Chapter 13 proceeding and closed its file on the bankruptcy proceeding. C.A. E.R. 34-35.

On April 15, 1985, the IRS assessed a deficiency in petitioners' federal income tax liability for tax year 1981. That assessment was made by a third IRS office—the Examination Division in San Jose, California—*after* the Ogden Service Center had checked its records at the request of the Portland Special Procedures Branch. C.A. E.R. 35.

Petitioners' Chapter 13 plan was confirmed by the Bankruptcy Court on May 16, 1985. On July 19, 1985, the IRS Collection Division in San Jose sent petitioners a request for payment of the 1981 deficiency. On July 30, 1985, petitioners' attorney mailed a notice of the bankruptcy to the Ogden Service Center. That notice was forwarded to the Portland Spe-

cial Procedures Branch, but it did not reach Special Procedures until after the IRS Collection Division had sent petitioners a second demand for payment of the 1981 assessment. On September 12, 1985, having by then received notice of the bankruptcy, Portland Special Procedures posted a "freeze" code to petitioners' 1981 account and all collection efforts ceased. C.A. E.R. 35-36.

Thereafter, Portland Special Procedures erroneously advised the Ogden Service Center that petitioners' bankruptcy case had been closed. The IRS then released the "freeze" code on petitioners' 1981 tax account and resumed collection efforts. C.A. E.R. 36-37, 102-105, 135-136.[1]

2. Petitioners initiated adversary proceedings in the bankruptcy court, seeking to hold the IRS in contempt for violating the automatic stay provision of the Code, 11 U.S.C. 362(a), and to recover general and punitive damages and attorneys' fees under Section 362(h) of the Code. The court found that willful violations of the automatic stay provision had occurred, and on this basis awarded petitioners damages and attorneys' fees.[2] The court also held that the

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[1] On March 14, 1986, the IRS sent petitioners a notice of intention to levy and a further request for payment of the 1981 tax liability. On April 15, 1986, the IRS offset petitioners' 1985 income tax refund in the amount of $825 against their unpaid income tax liability for tax year 1981. On February 16, 1987, a past due notice was sent by the IRS to petitioners requesting payment of their 1981 tax liability, together with notices of the IRS's intention to levy on and to file tax liens against their property. Finally, on March 20, 1987, the IRS offset petitioners' income tax refund for 1986 in the amount of $620 against the unpaid 1981 tax liability. C.A. E.R. 36-37, 102-105, 135-136.

[2] There were two separate proceedings in the bankruptcy court. Pet. App. A14-A25, A26-A29. The later-commenced

government had waived its sovereign immunity to monetary recovery under Section 106(c) of the Code. Pet. App. A14-A16, A25, A26-A29.[3]

3. The district court reversed and entered judgment in favor of the United States. Pet. App. A6-A13. It held that petitioners' action for money damages was barred by sovereign immunity. In so holding, the court determined that Section 106(c) did not waive the United States' sovereign immunity from retroactive monetary relief. The court relied on this Court's decision in *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818 (1989), in which the Court held that Section 106(c) does not abrogate the States' immunity under the Eleventh Amendment from retroactive monetary recovery. The district court here adopted the interpretation of Section 106(c) set forth in the plurality opinion in *Hoffman*, which construed Section 106(c) "as not authorizing monetary recovery from the states." Pet. App. A11-A12 (quoting *Hoffman*, 109 S. Ct. at 2823).

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proceeding concerned alleged violations of the automatic stay that occurred after the first proceeding had been commenced. In each proceeding, the bankruptcy court refused petitioners' request for punitive damages, finding that petitioners had failed to show that such damages were warranted. *Id.* at A16, A29. The two proceedings were consolidated on appeal to the district court.

[3] 11 U.S.C. 106(c) provides:

> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

This interpretation, the district court held, also applied to bar recovery against the United States. *Id.* at A12.

4. The court of appeals affirmed the district court's judgment. Pet. App. A1-A5. The court (Kozinski, J.) found it unnecessary to decide whether, as a general matter, Section 106(c) authorizes monetary recovery from the United States. Pet. App. A3-A4. The court held, instead, that Section 106(c) does not waive sovereign immunity from claims based on violations of the automatic stay provision, Section 362(a). Pet. App. A4. The court based this holding on the fact that the provision authorizing damages for violations of the automatic stay, Section 362(h), does not contain any of the three "trigger" words specified in Section 106(c). Pet. App. A4.

The court observed that, based on the plurality and dissenting opinions in *Hoffman*, its holding that relief was barred would likely be shared by a majority of this Court. While *Hoffman* concerned the immunity of the States, the court of appeals determined that "the plurality's reasoning [in *Hoffman*] is equally applicable to the immunity of the United States." Pet. App. A3 (citing *SPA* v. *Rinehart*, 887 F.2d 165, 170 (8th Cir. 1989)). Further, Justice Marshall's dissenting opinion in *Hoffman* "noted that * * * section 362(h), does not include any of the three magic words of section 106(c), and therefore does not apply to governmental units." Pet. App. A4 (citing *Hoffman*, 109 S. Ct. at 2826 n.4).

DISCUSSION

In our view, the court of appeals' decision is correct. Moreover, the decision does not conflict with the decisions of any other court of appeals. We therefore believe that plenary review by this Court is unwar-

ranted. At the same time, we recognize that the court of appeals' reasoning implicates an issue of significant importance on which the courts of appeals *are* divided—namely, whether Section 106(c) of the Bankruptcy Code waives the sovereign immunity of the United States from retroactive monetary relief. That issue is squarely presented in a case in which the United States has petitioned for certiorari, *United States* v. *Nordic Village, Inc.*, decision below, 915 F.2d 1049 (6th Cir. 1990), petition for cert. pending. Accordingly, we believe it is appropriate for the Court to hold the petition filed herein pending disposition of the petition in *Nordic Village*.

Section 106(c) provides that provisions of the Bankruptcy Code that contain any of three "trigger" words—"creditor," "entity," or "governmental unit" —apply to governmental units. 11 U.S.C. 106(c)(1). The court of appeals here held that Section 106(c) does not authorize awards of damages for violations of the automatic stay provision, 11 U.S.C. 362(a), because the provision authorizing damages for such violations, 11 U.S.C. 362(h), does not contain a trigger word. In light of this determination—which in our view represents a straightforward reading of Section 106(c)—the court of appeals did not decide the broader issue whether, as a general matter, Section 106(c) authorizes monetary awards against the federal government.

Nonetheless, that broader issue was implicated in the decision below. The court of appeals relied in part on its understanding of this Court's decision in *Hoffman*. The court below determined that its holding—that relief was not authorized under Section 106(c)—was supported by both Justice White's opinion for a plurality of the Court in *Hoffman* and Justice Marshall's dissenting opinion in that case. The

plurality's reasoning with regard to the States' Eleventh Amendment immunity was "equally applicable to the immunity of the United States" (Pet. App. A3). Also applicable, the court below determined, was the observation in the *Hoffman* dissent that because Section 362(h) lacks a trigger word, it does not apply to governmental units. Pet. App. A4.

Accordingly, we believe that there is no need for the Court to grant plenary review in the present case, but that it would be appropriate for the Court to hold this case pending the outcome in *Nordic Village*.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of this Court's disposition of *United States* v. *Nordic Village, Inc.*[4]

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

GARY D. GRAY
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Attorneys

APRIL 1991

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[4] We are supplying petitioners' counsel in this case with copies of our petition in *Nordic Village*.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20504

Supreme Court, U.S.
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(3)

No. 90-1208

**IN THE
SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM, 1990

JAMES C. PEARSON AND IDA J. PEARSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-1208

JAMES C. PEARSON AND IDA J. PEARSON,
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v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

STATEMENT

On April 23, 1991, Respondent filed a brief in response to the Petition for Certiorari in this case. Respondent argues that the Court

should hold this petition for certiorari pending the outcome of a case in which the United States has petitioned for certiorari, *United States v. Nordic Village, Inc.*, decision below, 915 F.2d 1049 (6th Cir. 1990), petition for certiorari pending. Petitioners oppose Respondent's position, and request that the Court grant certiorari in this case while holding the *Nordic Village* case pending the outcome in this case, for the following reason.

DISCUSSION

Respondent is in error in asserting that the Ninth Circuit Court of Appeals did not decide whether Section 106(c) authorizes monetary awards against the federal government. In reality, the Ninth

Circuit notes that the plurality opinion in *Hoffman v. Dept. of Income Maintenance*, 109 S. Ct. 2818 (1989), held that Section 106(c) does not waive the states' sovereign immunity to suit from money damages. The Ninth Circuit concludes, "While *Hoffman* dealt with the eleventh amendment immunity of the states, the plurality's reasoning is equally applicable to the immunity of the United States." Contrary to Respondent's assertion, the Ninth Circuit did decide the issue whether Section 106(c) authorizes monetary judgments against the federal government, and the Ninth Circuit's decision gives rise to the preliminary issue raised in the petition for writ of certiorari.

Respondent next asserts that the Court should hold this case pending the outcome of the case in which Respondent has petitioned for a writ of certiorari, *United States v. Nordic Village, Inc.* In fact, it would be more expedient and economical for the Court to grant a writ of certiorari in this case rather than in the *Nordic Village* case.

When Respondent petitioned for a writ of certiorari in *Nordic Village*, it raised only a single issue, namely, whether Section 106(c) of the Bankruptcy Code waives the sovereign immunity of the United States from an action seeking a monetary recovery in bankruptcy. By comparison, Petitioners in the case herein have raised two issues in their petition

for a writ of certiorari. The issue of whether Section 106(c) waives the sovereign immunity of the United States from monetary damages, which is the sole issue in *Nordic Village*, is only the preliminary issue in this case. A finding by this Court that Section 106(c) does in fact waive the sovereign immunity of the United States from monetary damages would give rise to the second issue presented by the instant petition for a writ of certiorari, whether Section 106(c), when read in conjunction with Section 362, authorizes a debtor in bankruptcy to recover a money judgment against the United States for violation of an automatic stay.

By hearing the instant case, the Court could decide the Section 106(c) issue common to this case and *Nordic*

Village. Should the Section 106(c) issue be decided in a way which merits the hearing of arguments on the Section 362 issue, the decision to grant certiorari in this case rather than in *Nordic Village* would enable the Court to proceed immediately to the second issue, without the unnecessary expenditure of administrative and judicial resources required to grant certiorari in this case, to read additional briefs and to hear additional arguments on the Section 362 issue. On the other hand, should the Court determine after granting certiorari in this case that no Section 106(c) waiver of sovereign immunity exists, that decision would effectively dispose of both cases. The interests of judicial and

administrative economy would be served by granting the petition for a writ of certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be granted at this time in the interests of economizing administrative and judicial resources.

Respectfully submitted,

BARRY L. TAUB
Attorney for Petitioners

June 1991